

Maginnis v Galler

2019 NY Slip Op 34810(U)

November 22, 2019

Supreme Court, Nassau County

Docket Number: Index No. 600545/2017

Judge: John M. Galasso

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

JOANN MAGINNIS, as Temporary Administrator of the Goods,
Chattels and Credits which were of the Estate of PETER T. MAGINNIS,
Deceased and on behalf of his distributes and individually,

Plaintiff,

- against -

Index No. 600545/2017
Sequence # 003
Motion Date 9/5/19

Part 16

BRIAN SCOTT GALLER, D.O., NSLIJ MASSAPEQUA
HEART ASSOCIATES, TIMOTHY PALMIERI, M.D.,
KORZUN TADEUSZ, M.D., NORTH SHORE UNIVERSITY
HOSPITAL and NORTHWELL HEALTH INC f/k/a NORTH
SHORE-LONG ISLAND JEWISH HEALTH SYSTEM,

Defendants.

Notice of Motion.....1
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Upon the foregoing papers, the motion brought by defendants, Brian Scott Galler, D.O.,
NSLIJ Massapequa Heart Associates, Timothy Palmieri, M.D., Korzun Tadeusz, M.D., North
Shore University Hospital and Northwell Health Inc f/k/a North Shore-Long Island Jewish Health
System Inc. (hereinafter collectively as "defendants"), for an order granting summary judgment
and dismissing the complaint with prejudice against defendants, pursuant to CPLR § 3212, is
determined as follows.

This is an action sounding in medical malpractice, wherein plaintiff, Joann Maginnis, as
Temporary Administrator for the Goods, Chattels and Credits which were the Estate of Peter T.
Maginnis, deceased and on behalf of his distributes, and Individually, is seeking damages for
serious personal injuries and wrongful death of Peter T. Maginnis (hereinafter "decedent"). It is
alleged, inter alia, that the defendants care and treatment from November 1, 2015 through and
including November 4, 2015, was negligent and departed from the accepted standard of care in
failing to properly perform a cardiac catherization with balloon angioplasty on November 2, 2015,
with improper post-operative monitoring and discharge, and failing to properly diagnose an arterial

occlusion, resulting in the decedent's multi-organ failure, cardiac arrest and death on November 4, 2015.

On November 2, 2015, the decedent who had a history of heart disease and prior myocardial infarctions, underwent a diagnostic cardiac catheterization to evaluate coronary artery occlusion upon the decedent's presentation of shortness of breath and difficulty breathing. On November 3, 2015, the decedent was released/discharged from the defendant North Shore University Hospital and returned the same day to the emergency room of said hospital complaining of "pain at angio site". A right lower extremity ultrasound was performed on the decedent revealing right common femoral artery occlusion. Revascularization surgery restoring blood flow to the right femoral artery was performed on November 3, 2015 and the decedent passed away following surgery in the early hours of November 4, 2015.

In support of their motion, the defendants submit, *inter alia*, copies of pleadings, Verified Bill of Particulars, copies of the deposition transcripts of plaintiff, Brian Scott Galler, D.O. (hereinafter "Dr. Galler"), Timothy Palmieri, M.D., (hereinafter "Dr. Palmieri"), Tadeusz Korzun, M.D. (hereinafter "Dr. Korzun"), and the admission records plaintiff on October 29, 2013, February 19, 2014, November 1, 2015 November 2, 2015 and November 3, 2015 by North Shore University Hospital (hereinafter "NSUH"). Defendants also submit the physician affirmations of the defendants' experts as follows: James Slater, M.D. (hereinafter "Dr. Slater"), Denise Nassisi, M.D. (hereinafter ("Dr. Nassisi"), George Todd, M.D. (hereinafter ("Dr. Todd"), and the affirmation of Avraham Schwartz, Esq., Vice President of the Medical Malpractice Program, Corporate Risk Management for Northwell Health, Inc., f/k/a North Shore-Long Island Jewish Health System, Inc. (hereinafter "Schwartz").

The defendants contend that the applicable standard of care was followed for the treatment of the decedent, and defendants, Dr. Galler, Dr. Palmieri, Dr. Korzun, Massapequa Heart Associates and NSUH, did not proximately cause the decedent's injuries. With regard to Dr. Palmieri, defendants claim summary judgment is appropriate because Dr. Palmieri, a resident, at the time of the decedent's treatment, was acting under the supervision of an attending physician and did not exercise any independent medical judgment. Lastly, defendants assert that Northwell Health Inc. is entitled to summary judgment, because, as a corporate entity, it does not provide or render medical care, treatment, and/or advice including year 2015, the year of decedent's treatment.

Dr. Slater, Dr. Nassisi and Dr. Todd submit their affirmations on behalf of the defendants upon a review of the plaintiffs' Bills of Particulars, Supplemental Bills of Particulars, medical records of NSUH, Dr. Galler, Massapequa Heart Associates, Plainview Hospital, Advanced Family Medicine and Long Island Kidney Associates, and the deposition transcripts of plaintiff, non-party Michael Maginnis, Dr. Galler, Dr. Korzun and Dr. Palmieri.

Dr. Slater is a physician, Board Certified in Internal Medicine with a subspecialty certification in interventional cardiology cardiovascular disease, who opines that the decedent, who had significant long-standing heart disease with several prior myocardial infarctions, sustained vessel occlusion including femoral artery occlusion, a known risk and complication that can occur following a proper cardiac catheterization. In Dr. Slater's opinion, defendants did not depart from the standard of acceptable care because the diagnostic cardiac catheterization was properly recommended and performed to evaluate coronary artery occlusion based upon complaints of shortness of breath; the decedent was appropriately informed of the risks associated with a cardiac catheterization and signed a consent form prior to the procedure taking place; that the decedent was properly evaluated two hours after the catheterization procedure and found to be hemodynamically stable and appropriately prescribed blood thinners; and that the hospital nursing documentation shows that the decedent had palpable 2+ pedal pulses in the right lower extremity, common to post-catheterization patients, and administered pain medications. Dr. Slater further states in his affirmation that these defendants did not proximately cause the plaintiff's claimed damages because the decedent did not require an opioid analgesic for pain relief on the day of discharge evidencing an improving clinical picture that supports the patients' discharge home. In Dr. Slater's opinion, the decedent's vessel occlusion was timely consulted and recommended for revascularization surgery but given the decedent's pre-existing, longstanding and worsening cardiac decompensated condition and coronary vessel atherosclerotic disease, he was unable to withstand the stress of revascularization surgery.

Dr. Nassisi is a physician Board Certified in Internal Medicine and emergency department attending physician, who opines that the emergency department attending, defendant, Dr. Korzun and resident physician Dr. Palmieri properly evaluated the decedent, performing a physical examination and ordering an urgent arterial ultrasound to obtain a right lower extremity ultrasound. In Dr. Nassisi's opinion, the working differential diagnosis of the decedent which included post catheterization pain, vessel injury nerve damage, pseudoaneurysm and arterial occlusion was appropriate and within the standard of care taking into consideration the patient's prior medical history and exam findings. Nassisi concludes that the decedent was appropriately monitored and continued to have vital stable signs and normal pulses while in the emergency room.

Dr. Todd is a physician board certified in general surgery and vascular surgery, who opines post-catheterization pain at the femoral artery access region can have a delayed onset of pain as the pain medications administered throughout the procedure wear off, and can also be attributable to femoral nerve neuropathy which can occur in the absence of negligence and may persist for weeks or months after the procedure. In Dr. Todd's opinion, the decedent was appropriately discharged given the absence of hematoma, swelling or tenderness at the cannulation site and the patient's ability to move an extremity evidenced sufficient blood flow to the extremity. Dr. Todd concludes that the emergency department physicians timely and appropriately requested vascular imaging based upon the patient's complaints and clinical findings after the ultrasound was performed.

In opposition, plaintiffs submit, the affirmation from plaintiffs' expert, a physician Board Certified in General Surgery and Vascular Surgery. This affirment reviewed the exhibits submitted with defendant's instant motion, the deposition transcripts of the parties to the instant action, the Affidavits of defendants' medical experts and the Nassau County Police Department EMS Report dated November 3, 2015 and the Certificate of Death of plaintiff's decedent.

The plaintiff's expert opines that, decedent exhibited symptoms associated with arterial occlusion and blood clots, including needing assistance with standing, walking and toileting, prior to discharge from the hospital on November 3, 2015, and that the standard of care and good accepted medical practice required the defendant hospital to notify the attending physician, Dr. Galler of these symptoms. In plaintiff's expert opinion the standard of care and good and accepted medical practice required Dr. Galler to speak with, examine the decedent and formulate a differential diagnosis to rule out blood clots by obtaining a sonogram prior to discharge. The expert affirmation states that in his/her opinion, the two-hour delay from the time the decedent arrived at the emergency room after discharge and the time he was first examined by Dr. Palmieri, was a departure from good and accepted medical proactive and applicable standards of care given the history of the patient's complaints and recent discharge. The physician affirmation concludes that the failure of the defendants to perform an ultrasound and vascular consultation prior to discharge and immediately upon presentation to the emergency department subsequent to discharge, contributed to requiring extensive vascular surgery which proximately caused the decedent's pain, suffering and death.

Contrary to the contentions of the defendants' in their reply papers, this Court will consider the plaintiff's expert's affidavit submitted in opposition to the instant motion, as there is no evidence that plaintiff's noncompliance with CPLR 2106 was intentional or willful and absent a showing of prejudice by the opposing party. *See, Hayden v. Gordon, 91 A.D.3d 819, 937 N.Y.S.2d 299 (2d Dept. 2012).*

It is well settled that summary judgment is designed to expedite the resolution of civil actions by eliminating from a court's trial calendar those claims that can be resolved as a matter of law. In most instances negligence cases (including medical malpractice claims) do not lend themselves to resolution by motion for summary judgment; however, where it can be established that there are no material issues of fact to be resolved, summary judgment may be appropriate. *Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]; Matusovkaya v. Valcourt, 6 A.D.3d 507, 774 N.Y.S.2d 424 [2nd Dept. 2004].*

The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]*). Once the movant has demonstrated a prima facie showing of

entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 593 [1980]).

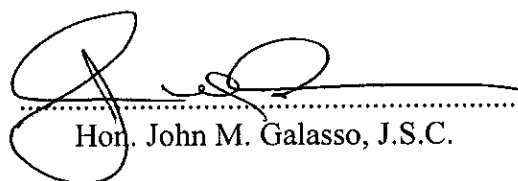
In the present case the parties have submitted conflicting medical expert opinions and “where the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution.” (*Trueba v. Diflo*, 116 A.D.3rd 948, 949, 83 N.Y.S.2d 827 [2nd Dept. 2014]).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury.” (*Wexlbaum v. Jean*, 80 A.D.3d 756, 758, 915 N.Y.S.2d 161 [2nd Dept. 2011]) See also, *Bjorke v. Rubenstein*, 53 A.D.3d 519, 861 N.Y.S.2d 757 [2nd Dept. 2008]).

Accordingly, the defendants’ summary judgment motion is denied.

This constitutes the decision and order of this Court. Any request for relief not expressly granted herein is denied.

Dated: November 22, 2019



Hon. John M. Galasso, J.S.C.

ENTERED
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